TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 439.

SAMUEL C. SCOTTEN AND SCOTTEN AND SNYDACKER, APPELLANTS,

vs.

CHARLES E. LITTLEFIELD, TRUSTEE FOR ALBERT O. BROWN ET AL., BANKRUPTS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED APRIL 11, 1914.

(24,159)

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INDEX.

a United States Circuit Court of Appeals for the Second Circuit.

In the Matter of A. O. BROWN & COMPANY, Bankrupts; SAMUEL C. SCOTTEN and SCOTTEN AND SNYDACKER, Appellants.

TRANSCRIPT OF RECORD.

Appeal from the District Court of the United States for the Southern District of New York.

1 United States Supreme Court.

In re A. O. BROWN and Others, Bankrupts; EX P. SAMUEL C. SCOTTEN and EX P. SCOTTEN & SNYDACKER.

It is Stipulated that as the transcript of record on appeal herein the Clerk of the Circuit Court of Appeals will certify to the Supreme Court:

I. The petition of appeal and allowance of same from the affirmance of the order dismissing the bill of review and said order; the assignment of errors, the bond and its approval, omitting the affidavits, statements and resolutions usually appended thereto, together with the citation, omitting all titles except to this first paper, and all acknowledgments.

II. The petition for leave to file said bill of review, dated June 1913, omitting title and verification; and the bill of review as amended and refiled Aug. 4, 1913 the notice of motion to dismiss the bill of review; and the order dismissing same, omitting caption and title, the opinion of Hand, J., upon the granting of said order; and the opinion of Lacombe C. J. affirming.

Further, that upon the argument of this appeal, if permit-
2 ted by the Supreme Court, either party may refer to the transcript of record, Supreme Court, October Term 1912, No. 572, entitled "The First National Bank of Princeton, Illinois, et al., Appellants, against Charles E. Littlefield, Trustee in Bankruptcy of Albert O. Brown & Ors.

It is also Stipulated that mandates in the usual form were issued by said Courts and orders of the District Court entered thereon, in conformity with the opinion of said Supreme Court.

And Further, that after the decision by the Supreme Court, appellants herein filed general proofs of claim in the usual form with the Referee in Bankruptcy in said matter, the same proofs which the bill of review herein prays for leave to amend as to amounts. That in June 1913, after filing said proof of claim, appellants served their motion papers for leave to file bill of review and same came on and was argued on July 7th. That the motion was granted—settlement of orders was noticed for July 9th. The order was signed and it and the bill of review was filed on same day and a copy served on Trustee's attorneys. That on request of said attorneys the settlement

was reopened and adjourned to July 15th 1913, and on August 4th Order was entered denying leave "because it is unnecessary."

THORNDIKE SAUNDERS,
Attorneys for Appellants.
DANIEL P. HAYS,
Attorneys for Appellee.

3 *Petition for Leave to File Bill of Review.*

Upon the petition of Samuel C. Scotten and said Samuel C. Scotten and Joseph G. Snydacker, composing the firm of Scotten and Snydacker, all residents and citizens of Chicago, Illinois, for leave severally to file the annexed petitions of review of the decree entered in the Clerk's office of this Court in the above entitled action in Bankruptcy for errors of law now appearing upon the face thereof and of the record herein.

To the Hon. the District Court of the United States for the Southern District of New York:

Your petitioners severally petition your Honors that by the decree entered herein April 20th, 1911, as they are severally advised, they are injured and unjustly oppressed.

That errors of law are apparent upon the face of the record herein, as set forth in said petition, which could not be made apparent till now, but which, being considered, would lead to a different result than is reached in said decree:

Wherefore, they respectfully pray leave to file a bill of review against said decree to reverse it and set it aside, and such other proceedings in the matters be had as to your Honors may appear just.

THORNDIKE SAUNDERS,
Solicitor for Petitioners.

4 *Bill of Review.*

The Petition of Samuel C. Scotten and said Samuel C. Scotten and Joseph G. Snydacker, Composing the Firm of Scotten and Snydacker, All Residents and Citizens of Chicago, Illinois.

To the Honorable the District Court of the United States for the Southern District of New York:

Said Samuel C. Scotten and S. C. Scotten and Joseph G. Snydacker severally present to your honors this, their Petition, and respectfully show the following facts upon the record herein:

On the 17th — February 1910, an order was entered herein which recites the following facts and direction—as follows:

"The several petitioners aforesaid, having filed petitions and been referred to Special Master and having obtained and filed his reports in their favor; And the U. S. District Court having denied their

motion to confirm said reports and dismissed their several petitions, &c., and a petition for review having been filed, argued and determined on behalf of above-named petitioner, The First National Bank of Princeton, Ill., and the U. S. Circuit Court of Appeals having modified the decision and order of the U. S. District Court providing that said order shall be without prejudice to further proceedings by the claimant within thirty days from the date hereof. And a stipulation having been heretofore made to the effect that the other petitioners in reclamation above named shall abide by the result of aforesaid review.

Now,

Ordered, That above named petitioners in reclamation have leave to file amended petitions or to proceed upon the original petitions heretofore filed herein within thirty days from entry hereof. That all such petitions are hereby referred to Special Master, John J. Townsend for hearing, determination and report."

That thereafter and on the 1st day of November 1910, the Special Master's report was filed in the Clerk's office, which, among other things, reads as follows:

"Claimants ask 300 Steel or proceeds from the pledges to Hanover Bank.

'But as Claimant has failed to trace to Hanover Bank any particular certificate, I feel constrained to follow the decision of the C. C. A. of this Circuit, in re McIntyre & Company, ex parte Grace, affirming Referee Olney, same case, 24 A. B. R. at page 20 and 25'" (Report, page 40).

He says the same as to Scotten and Snydacker that he does in respect to Scotten (Report, page 46).

The Special Master epitomizes Claimant's contentions, omitting, however, the fact that the brokers constantly reported the carrying of the Steel stock to both of these claimants and he says:

"'Claimant's contention is supported by in re Brown ex parte Gibbons &c. 22 A. B. R. 550—Richardson vs. Shaw, 19 A. B. R., 717 to 721—in re Graff 8 A. B. R., 744 to 748—Skiff vs. Stoddard, 63 Conn., 198, 225, recognized in Richardson vs. Shaw as leaving nothing to be said.'

"Sam C. Scotten carried in his account 100 Steel and '50 Gno.' and Scotten & Snydacker carried 200 Steel. None of the shares could be traced. The numbers of the certificates not appearing in the books; but a thousand shares were in pledge to the Hanover Bank and the surplus on the pledge, free of claim, is in hands of trustee."

That exceptions to this report were filed by your petitioners' solicitor and attorney in said Clerk's office on Nov. 4th, 1910, those numbered 7 to 9 inclusive reading as follows:

"Separately, each for himself, above named petitioners, except to the findings and rulings of Special Master, John J. Townsend, Esq., in respect to Hanover Bank Fund.

"Seventh.—That the Circuit Court of Appeals for the Second Circuit in 'In re McIntyre Esq., Grace,' required the particular certificate to be traced.

"Eighth.—That claimant Scotten failed to trace his 100 shares of U. S. Steel common stock or its proceeds in the Hanover National Bank fund.

"Ninth.—That claimants Scotten and Snydacker have
7 failed to trace their 200 shares of U. S. Steel Stock or the proceeds thereof with the Hanover National Bank Fund."

That thereupon this Court wrote as follows in its opinion:

"Ex Parte SCOTTEN.

Ex Parte SCOTTEN AND SNYDACKER.

Claims to Stock in Specie.

"(6) These claimants likewise claim some of their stock in specie upon the theory that it must be presumed to be included in some of the collateral found with the bank, 1,000 shares of United States Steel, 3,000 shares of Copper. It is enough that they do not make proof that there was continuously on hand from the time of the receipt of their stocks by the brokers an amount of stock large enough to cover their claims. It has been decided twice by the Circuit Court of Appeals, Re McIntyre, Ex parte Talbot, 181 Fed., 960, 104 C. C. A., 424, Re Brown, Ex parte Gorman, 184 Fed., 454, that there is no presumption of restoration arising from the presence of similar stock at insolvency. Therefore, it is necessary to show a continuous fund of stock equal to the claimant's.

"(7) It is true that there seems to be a general supposition, and indeed this case has proceeded upon that basis, that the sale of the particular certificate purchased for a customer is a conversion and justifies him in following the proceeds. That is not the law.
8 Re McIntyre, Ex parte Nevin, 174 Fed., 627, 98 C. C. A., 381. All a broker need do is to keep on hand enough stock, free or hypothecated for no more than his own lien upon it, to meet his obligations. Strictly speaking, no one of the customer claimants in this case has shown that their stock was converted, for the proof does not formally show that there was not on hand enough stock to meet all orders. This may be assumed, however, for the result is the same in any case."

And on 20th April, 1911, it was

"Ordered, that the claims in reclamation of First National Bank of Princeton, Illinois, William H. Simpson, Fred J. Bullen, Samuel C. Scotten, Scotten & Syndecker, Martha Leland, Ernest T. Fellows, Henrietta C. Schroeder-Burley, Thomas E. Conklin and Bessie H. Parker (No. 2) filed in the office of the Clerk of this Court, be and the same hereby are dismissed without costs to either party as against the other, and it is further

"Ordered, that the foregoing shall be without prejudice to the rights of the said claimants, and each of them, to file within 10 days from the entry hereof a proof of claim with the Referee as

general creditors for the amount due him or them herein; and it is further

"Ordered, that each and all of the above named claimants, and each and every other individual, firm and corporation be and they hereby are, and each of them hereby is enjoined and fore-
9 closed from making, asserting, or prosecuting, in law or in equity, any claim to the cash, stocks, bonds and securities, the subject of this proceeding; and it is further

"Ordered, that after the payments aforesaid the residue and remainder of the funds, the subject of this proceeding, be paid by the trustee to himself for the benefit of the general estate herein."

In re McIntyre, cited by the Special Master and by the District Judge and affirmed by the Circuit Court of Appeals Aug. 11th, 1910, related only to 95 shares of the 200 shares of stock, claimed, while the bankrupts owed their customers 1,651 shares. This negatived the presumption that the 95 was intended as a restoration of claimant's stock; but it was held to apply in principle as requiring identification of the specific certificates with the transactions for claimant. And when, on the review of the Special Master "In re Brown exp. Gorman" this thought was epigrammatically expressed by the Court in the phrase "Similarity of kind does not prove specific property," and the Circuit Court of Appeals, Jany. 9, 1911, affirmed the District Court order, seeing no reason to modify their opinion "In re McIntyre," which they said involved the same point raised herein.

In the United States Supreme Court. The appeal "In re Brown exp. Gorman" entitled therefor "James E. Gorman against Charles E. Littlefield &c." was taken. This was on the 20th February, 1911.

Petitioner's solicitor herein was one of the counsel who pre-
10 sented the appeal in the Circuit Court of Appeals and who obtained the allowance of appeal to the Supreme Court. His connection with "In re Gorman" then ceased but he continued to watch that case inasmuch as the question involved therein was the same question that in the case at bar is raised as to petitioners' Steel Stock proceeds.

Petitioners' counsel thereupon, after the District Court Order of April 29, 1911, presented their appeals in the Circuit Court of Appeals and upon their affirmance appealed to the Supreme Court and stipulated that the appeals of Simpson, of Bullen, of Scotten and of Scotten and Snydacker for proceeds of stock converted by bankrupts, being practically in the same position as that of the appeal in case of The First National Bank of Princeton, Illinois, should be governed by the result of the appeal therein.

The Supreme Court affirmed the affirmance of the Circuit Court of Appeals of the orders below, stating reasons in its opinion. Petitioners did not lose sight of their Steel stock contentions, but awaited the result in Gorman's appeal.

The appeal in the cause "James E. Gorman against Charles E. Littlefield," wherein the sole question was identical with the question as to petitioners' Steel Stock, results on the 26th day of May, 1913, in a reversal of the decision and order of the Circuit Court of

Appeals, the Court holding that the possession of similar shares of stock in hand or in pledge at failure, to which no other claim had been presented, raised the presumption that such stock to an amount sufficient to cover claimants' demand was carried for his account. Petitioner prays to refer to the Records, including all opinions as part of this petition.

11 Your orators further show to your Honors that before the result in re Gorman vs. Charles E. Littlefield was made their petitioners' attorneys in New York had filed proofs of debt of their general accounts and obtained the consent to their allowance.

Wherefore, by reason of all the premises, your petitioners do pray that the order of the Court of April 20, 1911, aforesaid as to their claims for the 300 shares of Steel stock, the proceeds of which, less the lien of pledgees, the Hanover National Bank, were delivered to this Receiver herein, now the trustee, to wit, the sum of $53,597 66/100, may be modified so as to direct the trustee herein to deliver the value of said Steel stock to your petitioners or to their attorney.

That all subsequent proceedings therein, including the said stipulation, may be conformed thereto and that the proofs of debt may be amended so as to make claim for the balance of their several accounts, after subtracting the values of said Steel stock.

And your orators will ever pray, &c.

THORNDIKE SAUNDERS,
Solicitor for Petitioners.
27 *William Street, New York, N. Y.*

Notice of Motion to Dismiss Bill of Review.

Please to take notice that upon the bill of review filed herein on August 4th, 1913, the transcript of record of the Supreme Court of the United States, October Term, 1912, numbered 572, en-

12 titled "The First National Bank of Princeton, Illinois, Samuel C. Scotten and others, appellants, against Charles E. Littlefield, Trustee in Bankruptcy of Albert O. Brown et al., Appellee," the mandate of said Supreme Court of the United States, and the order of this Court entered thereon, the transcript of record in the United States Circuit Court of Appeals for the Second Circuit *Court*, entitled "The First National Bank of Princeton, Illinois, Samuel C. Scotten and Scotten & Snydacker, Appellants, against Charles E. Littlefield, as Trustee in Bankruptcy of Albert O. Brown and others, Appellee," the mandate of said Circuit Court of Appeals for the Second Circuit, and the order of this Court entered thereon, and upon the proof of claim filed herein in the office of Hon. John J. Townsend, Referee in Bankruptcy in charge of this bankruptcy proceeding, by Samuel C. Scotten and Scotten & Snydacker, we shall move this Court at a Term thereof, appointed to be held in the Post Office Building, Borough of Manhattan, on the 18th day of August, 1913, at 10:30 o'clock in the forenoon of said day or as

soon thereafter as counsel can be heard, for an order dismissing said bill of review.

Dated, New York, August 5th, 1913.

Yours, &c.,

HAYS, HERSHFIELD & WOLF,
Attorneys for Charles E. Littlefield as Trustee in Bankruptcy of Albert O. Brown et al., No. 115 Broadway, Borough of Manhattan, New York City.

To Thorndike Saunders, Esq., Attorney for Samuel C. Scotten and Scotten & Snydacker.

13 *Order Dismissing Bill of Review.*

A motion having been made herein for an order dismissing the bill of review herein;

On reading and filing the notice of motion, dated August 5, 1913, the bill of review filed August 4, 1913, the petition for leave to file the same, the transcript of the record of the Supreme Court of the United States, October Term, 1912, numbered 572, entitled "First National Bank of Princeton, Illinois, Samuel C. Scotten and others, Appellants, vs. Charles E. Littlefield, Trustee in Bankruptcy of Albert O. Brown et al., Appellee," the mandate of the said Supreme Court of the United States and the order of this Court entered thereon, the transcript of record in the United States Circuit Court of Appeals for the Second Circuit, entitled "First National Bank of Princeton, Illinois, Samuel C. Scotten and Scotten & Snydacker, Appellants, vs. Charles E. Littlefield, as Trustee in Bankruptcy of Albert O. Brown and others, Appellee," the mandate of said Circuit Court of Appeals for the Second Circuit, and the order of this Court entered thereon, and the proof of claim filed herein in the office of the Referee in bankruptcy, and after hearing counsel, it is

Ordered that said motion be and the same hereby is granted, and the said bill of review, be and the same hereby is dismissed.

LEARNED HAND, *D. J.*

14 *Opinion of Judge Hand.*

Thorndike Saunders, Esq., for Complainant.
Ralph Wolf, Esq., for the Defendant.

HAND, *D. J.:*

So far as the order granting leave is concerned, it was not necessary, because the complainant in the bill for review could have filed the bill without any order, if it be a bill of review for errors apparent on the record. Ricker vs. Powell, 100 U. S., 104, 109. Davis vs. Speiden, 104 U. S., 83; the rule goes back to Lord Bacon's Ordi-

nances. That it is only a bill of review for error apparent on the record appears from Tilghman vs. Werk, 39 Fed. R., 680, a decision by Mr. Justice (then Judge) Jackson, who was exceptionally learned in matters of equity procedure. Indeed the only theory upon which the bill can stand is that the law was misconceived by this Court when it signed the order; the fact that this Court was then controlled by an authoritative decision of the Circuit Court of Appeals does not change the result. An error of law is a misconception of what the rule is which will eventually be enforced by the court having the final word. No new fact is now suggested which could have been originally pleaded properly.

This is enough to dispose of the order, but as the question has been thoroughly argued in other respects, and, as the decision of the bill of review will be inevitably referred to me, I think it will be the quickest way to state my judgment more at large as to the validity of the bill itself on the merits, especially as it seems to me to have some fatal defects which inevitably make it bad. The time within which an appeal might be taken from the original

15 order is long since passed, and the only theory upon which the complainants can meet the usual rule which limits the time to file such a bill, Thomas vs. Harvie, 10 Wheat., 146, is that the case was out of the jurisdiction of this court so much of that time that there have not been six months during which the Court could have entertained the bill, Ensminger vs. Powers, 108 U. S., 292. That case was one in which the appeal was dismissed under circumstances which were held to excuse the appellant. There is no case which I have found where the appellant who has actually procured the hearing on the merits of one appeal has been allowed afterwards to take another. However, even if such a bill to review might in some cases be good it is quite apparent that there would be no equity in permitting it here in view of all the facts, for the following reasons: When the complainants appealed from so much of the order as dismissed these two petitions, they removed the whole proceedings into the Circuit Court of Appeals.

The scope of the review by the Circuit Court of Appeals was limited, however, by the assignment of errors. Now the assignment of errors either included the question now raised, or it did not. If it did include the questions now raised, the Circuit Court of Appeals passed upon them and for obvious reasons under the authorities, no bill of review in this court lies, Southard vs. Russell, 16 How., 546, 570; Kimberly vs. Arms, 40 Fed. R., 548, at least without leave of the Appellate Court. If on the other hand the assignment of errors did not cover the case, it was because the complainants here chose to leave that feature of the order of this Court unas-

16 sailed. If they did, there is no room for the application of the rule in Ensminger vs. Powers, supra, for there the appeal attempted to raise the point. Not only might they have originally added an assignment of error upon that point, but they might also have amended their assignment of errors in the Circuit Court of Appeals to include it, or even, if "a plain error," they might have urged it under Rule 11 of the Rules of the Circuit Court of Appeals without assignment. Nor may they say that they were not aware

of the point, for their counsel successfully raised the same point in Gorman's appeal in this very proceeding, the decision in which is the cause of this application. Indeed in this very case the seventh exception to the Master's report challenged the rule of law laid down in the case of Re McIntyre, Ex parte Grace, which required the particular certificate to be traced, thus showing that at one period this question was raised. The eighth and ninth exceptions to the Master's report raised the same question.

The result, therefore, of allowing this bill of review (assuming that the Circuit Court of Appeals had jurisdiction to pass on the point) would be to permit them to split up their appeal, raising some questions and reserving the rest. There is really no reason why this should not go on for several separate appeals until the aggregate of the separated periods during which this Court had jurisdiction of the case amounted to six months. Such a result certainly would be a very pernicious precedent, and would put a premium upon delay. Assuming that the complainants failed to assign the error now complained of, I decide they chose to waive it, and that they may not now by an independent proceeding take it up.

17 It is true they felt bound by the decision of the Circuit Court of Appeals, but an appeal to the Supreme Court was as open to them in this case, as it was in Gorman's. If they had no appeal to the Supreme Court, there would be much more force in their contention if made before the Circuit Court of Appeals, for they were entitled to assume that the Circuit Court of Appeals would have followed its own decision. That they knew of the possibility of such an appeal Gorman's case shows and they must be held definitely to have waived it when they took no steps to press the point. Two courses were open to them, to save the point by assignment, or to procure a stipulation which would cover it in case the Supreme Court reversed Gorman's case.

All the preceding assumes that the point was reserved from the consideration of the Circuit Court of Appeals, but the record shows the contrary. The two petitions themselves did not claim any securities in specie; they contained no allegation that any such securities were in existence and no prayer for their delivery. They only asserted some right in the proceeds arising from their sale. However, the seventh, eighth and ninth exceptions to the Master's report are broader and perhaps it is fair to say that they raised the question, in so far as mere exceptions which depart from the pleading can do so. The assignment of errors, especially the first, second and third, covered every possible theory upon which the recovery might have been given, including anything suggested by these exceptions. In these assignments it was alleged an error to have dismissed the petitions (which included any possible relief under them), and also to have held that the appellants had no rights "in specie," or in the "properties," as well as in the cash surplus

18 in the hands of the Receiver. Such assignments certainly covered any possible claim which the petitions could be stretched to cover by the help of the exceptions and show that the point was raised in the Circuit Court of Appeals which is now sought

to be raised by this bill of review, i. e., whether the petitioners had not shown themselves entitled to some specific shares of stock in the hands of the Receiver. Hence, the petitioners presented to the Circuit Court of Appeals the very point now raised and this Court should not review it. If on the other hand the petitions are to be read without the exceptions, there was never any claim for the specific securities and no ground for the recovery at all.

Finally it is at least a question whether the unexpected ruling of a Court is ground for a bill of review. Thus in Hoffman vs. Knox, 50 Fed. R., 484, the Circuit Court made its own ruling upon the constitutionality under the State Constitution of a State statute. Later the State Court held differently in another case, a decision which is usually as absolutely conclusive as a ruling of the Supreme Court itself. The Court of Appeals for the Sixth Circuit, Chief Justice Fuller presiding, held that such a ruling did not constitute error apparent on the record. It must be conceded, however, that it is not certain that the ground of decision was not in part due to the unwillingness of the Court, as matter of substantive law, to make the State decision apply as ex post facto. In Tilghman vs. Werk, 39 Fed. R., 680, Judge Jackson declined to regard a change in the decision of the Supreme Court as the ground for a bill on newly discovered evidence; whether he might have held it good as error apparent of the record does not appear.

19 My conclusion, therefore, is that if the bill is filed, it would be a subject to be dismissed on motion as being invalid in law on its face.

The motion for leave is denied on the ground that it is unnecessary.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, Dec. 3d, 1913.

HAYS, HERSHFIELD & WOLF,
Attorneys for Appellant.
THORNDIKE SAUNDERS,
Attorneys for Appellee.

20 United States Circuit Court of Appeals, Second Circuit.

In the Matter of A. O. Brown & Others, Bankrupts; Samuel C. Scotten, and Scotten & Snydacker, Appellants.

Before Lacombe, Coxe, and Ward, Circuit Judges.

This cause comes here upon appeal from an order of the District Court, Southern District of New York, dismissing a bill of review filed by appellants August 4th, 1913 to review a decree entered in this proceeding on April 20th, 1911, which decree dismissed the reclamations of appellant. The opinion of Judge Hand will be found in — F. R. —.

LACOMBE, *C. J.*:

The facts presented on this appeal are as follows:

The firm of A. O. Brown & Company being in bankruptcy, Scotten on February 13th, 1909 filed a claim in reclamation to 100 shares Steel Common and 300 shares Great Northern Ore. He averred ownership, that the securities were held by the bank-
21 rupts as security only for certain debit balances against petitioner, that the bankrupts sold part of the securities and that the rest were sold by a bank with which the bankrupts had pledged them, whereby the bankrupts became unable to redeliver the securities to petitioner but that the proceeds came into the hands of the trustee in bankruptcy. He prayed that the trustee be directed to pay to him the proceeds of the securities so sold. Scotten & Snydacker on the same day (February 13th, 1909) filed a similar claim for the proceeds of 200 shares Steel Common and 85 shares Illinois Central.

These two claims, with several others some of them represented by the same attorney who appeared for the two, including a claim of the First National Bank of Princeton, came before the Referee acting as Special Master. After a report and rehearing upon the same he filed a second report, November 1st, 1910, holding that in the Scotten case the trustee was entitled to an order denying petitioner's claim in reclamation, without prejudice to a part of it, which concerned the 100 shares of Great Northern Ore Stock concerning which last-named stock no contention is now made here. In the case of Scotten & Snydacker he held that the trustee was entitled to an order denying claimant's petition in reclamation.

The report of the Special Master as to claims of First National Bank of Princeton, Simpson, Bullen and these two claims of Scotten and Scotten & Snydacker came before the District Court for review and an order was entered April 20th, 1911 confirming the Special Master's report "throughout". On June 29th, 1911 the five
22 last-named claimants appealed from that order to this court.

The assignments alleged error, in the following particulars (among others).

1. In dismissing the several petitions.

2. In deciding that claimants' funds were not traced into or connected with the properties and money delivered by the Hanover National Bank to the receiver on September 5th, 1908. It may be noted that it is the contention of these two claimants that 1,000 shares of Steel Common which the Bankrupts pledged with the Hanover Bank as collateral to a loan, included their shares of steel, or a like number of shares which had been bought by the bankrupts to replace theirs.

3. In omitting to decide that claimants' funds or some part thereof had been traced into or connected with the securities deposited by bankrupts with the Hanover National Bank on August 24th, and 25th, 1908 and which either in specie or in surplus came into the hands of the receiver in bankruptcy.

12. In omitting to determine that claimant's funds were a charge upon the mass of securities and moneys delivered by the Hanover

National Bank to the receiver in bankruptcy on or about September 5th, 1908.

That appeal was argued on December 15th, 1911 and decided January 8th, 1912. Our opinion will be found reported in 193 F. R. 24. From our decision the five claimants appealed to the Supreme Court, which affirmed the Court of Appeals 226 U. S. 78.

23 In a separate proceeding instituted by one Gorman to establish a claim in reclamation to some shares of Greene Cananea stock we held on January 9th, 1911 that the claimant had not sufficiently identified. 184 F. R. 454. From that decision appeal was taken to the Supreme Court, which held that there was sufficient proof of identity, reversing our decision. Gorman v. Littlefield 229 U. S. 19.

It is the theory of these claimants that if the rule enunciated in Gorman v. Littlefield had been applied to the facts in their cases it would have been held that as to their steel stock identity had been proved. They therefore bring this bill of review which in substance and effect prays for a re-trial of their respective claims. They contend that they did not present any argument to the District Court or to the Court of Appeals or to the Supreme Court as to this part of their claim and that in their record on appeal they left out some of the testimony that referred to the steel stock; also that the appellate courts did not deal with that question.

It appears then that these claimants originally advanced the claim which is the subject of their bill of review: that they either took all the testimony they could muster in its support, or had full opportunity to do so before the referee. That they elected not to argue before the District Court the proposition that they had traced their steel stock into the block of 1,000 shares which was pledged to the Hanover Bank. That, although many months before their appeal was argued in this court the Gorman case had been disposed of here and an appeal from our decision therein taken (by their

24 own counsel, who also appeared for Gorman), they elected not to present and argue the question—(or at least present and reserve it) that our decision in the Gorman case was unsound. That before the Supreme Court they elected not to call attention to this same question, although for some reason, the appeal in the Princeton Bank and these two cases came on for argument there before the earlier appeal in the Gorman case.

Their theory seems to be that they may bottle up part of their claim, which was as originally presented a single one, during review by three successive courts and then years afterwards bring it forth de novo to be presented for decision.

Such practice would be intolerable and we fully concur with Judge Hand in his disposition of the bill of review.

Order affirmed.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of A. O. Brown & Others, Bankrupts, Samuel C. Scotten & Scotten & Snydecker, Appellants. Opinion. Lacombe,

C. J. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 10, 1914. William Parkin, Clerk.

25 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 20th Day of March, One Thousand Nine Hundred and Fourteen.

Present:

Hon. E. Henry Lacombe,
Hon. Alfred G. Coxe,
Hon. Henry G. Ward,
Circuit Judges.

In the Matter of A. O. Brown & Company, Bankrupt: Samuel C. Scotten and Scotten & Snydacker, Appellants.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed with costs.

E. H. L.
A. C. C.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

26 Endorsed: United States Circuit Court of Appeals Second Circuit. In re A. O. Brown et al. vs. —— ——. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Mar. 24, 1914. William Parkin, Clerk.

27 *Petition of Appeal.*

In the United States Court of Appeals.

The intervening petitioners herein said appellants, to-wit, Samuel C. Scotten and Scotten and Snydacker, severally conceiving themselves aggrieved, by the order and decree of the District Court of the United States, entered on the — November 1913, dismissing the bill of review herein and the affirmance of the same by the Circuit Court of Appeals for the Second Circuit, and by the errors set forth in their assignment of errors herewith filed, do hereby pray the Court for an order granting leave to appeal, and that a transcript of

the record and proceedings and papers on which said order and said affirmance were made and entered, or such parts of them as are pertinent to the said errors, be duly made, authenticated and sent to the United States Supreme Court at Washington, District of Columbia.

Dated New York, April 2, 1914.

THORNDIKE SAUNDERS,
Attorney for Petitioners-App'llnts,
27 *William St., N. Y. City.*

The foregoing appeal is hereby allowed.

E. HENRY LACOMBE, *U. S. C. J.*

28 *Assignment of Errors.*

Now, on the 2nd day of April 1914, comes Samuel C. Scotten and the firm composed of said Samuel C. Scotten and Joseph G. Snydacker, to-wit, Scotten and Snydacker, Appellants, severally, by Thorndike Saunders, their attorney, for them and each of them and each for himself, alleges that the order herein, dismissing their bill of review and the order affirming the same by Circuit Court of Appeals for second Circuit are erroneous.

First. That said Circuit Court of Appeals affirmed the order of the District Court, dismissing said bill of review.

Second. Deciding that claimants' reservation of the separable claims for Steel stocks or the surplus arising from the same in the hands of the trustees, was "intolerable practice."

Third. Omitting to decide that appellants' claims, set forth in their bill of review and in the Master's report and extract from the opinion of Judge Hand in the District Court, therein included, were separable from appellants' claims for stocks converted by bankrupt, before bankruptcy, or the proceeds thereof.

Fourth. Omitting to determine that the decree complained of was founded and specifically stated to be founded by the District Court on the facts that the aforesaid Circuit Court of Appeals had decided two similar cases: to-wit, the claim of Gorman in this matter of Brown and the claim of Talbot in the matter of McIntyre, referred, to in said opinions and reports or extracts thereof and that under those decisions no presumption of restoration arose from the
29 possession of similar stocks at insolvency, etc.

Fifth. Omitting to decide that appellants, in their appeals in the said cause "First National Bank of Princeton, Ill., vs. Littlefield" limited such appeals to tracing the proceeds of Scotten's Great Northern ore and Scotten and Snydacker's Illinois Central certificates, omitting from the records in both Circuit Court of Appeals and in the Supreme Court all testimony relating to their claims for Steel stocks or surplus in the hands of the Trustee, now brought forward as the basis of this Bill of Review.

Sixth. Omitting to decide that the judgment and mandate in "Gorman vs. Littlefield" was evidence of two things: First, a fact that the Supreme Court has reversed the Circuit Court of Appeals in

said matter of Gorman, and second, a rule of law applicable to cases presenting similar claims.

THORNDIKE SAUNDERS,
Att'y for Appellants.

30 American Surety Company of New York.

Capital and Surplus Over $6,000,000.

Company's Office Building, 100 Broadway, New York.

United States Circuit Court of Appeals for the Second Circuit.

60718.

In the Matter of A. O. BROWN & COMPANY, Bankrupts; SAMUEL C. SCOTTEN and SCOTTEN AND SNYDACKER, Appellants.

Know all men by these presents, That the American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, having an office and principal place of business at No. 100 Broadway, Borough of Manhattan, City of New York, is held and firmly bound unto Charles E. Littlefield, Trustee for Albert O. Brown, et al., Bankrupts, in the sum of Five Hundred Dollars ($500.00), to be paid to the said Charles E. Littlefield, Trustee for Albert O. Brown et al., Bankrupts, his successors or assigns; for the payment of which well and truly to be made, the said American Surety Company of New York binds itself, its successors and assigns, firmly by these presents.

Whereas, the intervening petitioners in reclamation herein, to-wit, Samuel C. Scotten and Scotten & Snydacker, composed of said Scotten and Joseph G. Snydacker, have prosecuted an appeal to the United States Supreme Court to reverse the decree of the United States Circuit Court of Appeals for the Second Circuit, entered herein on or about the 2nd day of April, 1914, and which said decree affirmed the order entered herein on the 11th day of November, 1913, in the office of the Clerk of the District Court of the United States, for the Southern District of New York,

Now, the condition of this obligation is such, that if said Samuel C. Scotten and Scotten & Snydacker, composed of said Scotten and Joseph G. Snydacker shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, then this obligation to be void; otherwise, to remain in full force and virtue.

Dated, New York, April 2nd, 1914.

[L. S.] AMERICAN SURETY COMPANY OF NEW YORK,
By MARSHALL L. BROWER,
Resident Vice-President.

Attest:
GEORGE R. CROSBY,
Resident Assistant Sec't'y.

Approved as to form and sufficiency.
April 2d, 1914.
E. HENRY LACOMBE, *U. S. C. J.*

31 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 30 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the Matter of A. O. Brown & Company, Bankrupts, Samuel S. Scotten, et al., Appellants, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3d day of April, in the year of our Lord One Thousand Nine Hundred and fourteen and of the Independence of the said United States the One Hundred and thirty-eighth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

32 *Citation.*

United States Circuit Court of Appeals for the Second Circuit.

(Title.)

The President of the United States of America to Charles E. Littlefield, Trustee in Bankruptcy Herein:

You are hereby cited to appear in the United States Supreme Court in the City of Washington, District of Columbia, within 30 days from the date of this writ pursuant to an appeal filed in the office of the Circuit Court of Appeals for the 2nd Circuit, to show cause, if any there be, why the errors mentioned in said appeals should not be corrected and speedy justice given to the parties in that behalf.

Witness the Hon. E. Henry Lacombe, Chief Judge of the U. S. Circuit Court of Appeals for the 2nd Circuit, this 2d day of April, 1914.

E. HENRY LACOMBE,
U. S. Circuit Judge.

Service of the within bond, petition of appeal, assignment of errors & citation admitted this 2nd day of April, 1914.

DANIEL P. HAYS,
Att'y for Appellees.

Endorsed on cover: File No. 24,159. U. S. Circuit Court Appeals, 2d Circuit. Term No. 439. Samuel C. Scotten and Scotten & Snydacker, appellants, vs. Charles E. Littlefield, trustee for Albert O. Brown et al., bankrupts. Filed April 11th, 1914. File No. 24,159.

13

Supreme Court of the United States.

No. 1008. 439

OCTOBER TERM, 1914.

IN THE MATTER

of

A. O. BROWN & CO.,

Bankrupts,

SAMUEL C. SCOTTEN *et al.*,

Appellants,

CHARLES E. LITTLEFIELD, AS TRUSTEE IN BANKRUPTCY OF A. O. BROWN & CO. *et al.*,

Appellee.

NOTICE OF MOTION, AFFIDAVIT AND OPINION OF CIRCUIT COURT OF APPEALS, 213 FED. REP., 705, AFFIRMING DECREE DISMISSING BILL OF REVIEW.

DANIEL P. HAYS,

Solicitor for CHARLES E. LITTLEFIELD *as Trustee, etc., Appellee, and for the Motion.*

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

Supreme Court of the United States.

In the Matter of A. O. Brown & Co., Bankrupts, Samuel C. Scotten *et al.*, Appellants, Charles E. Littlefield, as Trustee in Bankruptcy of A. O. Brown & Co. *et al.*, Appellee.	No. 1008. October Term, 1913.

Sir:

Please to take notice that upon the annexed affidavit of Daniel P. Hays, verified the 27th day of August, 1914, the transcript of record herein in the United States Circuit Court of Appeals for the Second Circuit, and the opinion of the said Circuit Court of Appeals upon such appeal, I shall move this Court at a term thereof appointed to be held in the City of Washington, District of Columbia, on the 12th day of October, 1914, at the Court House thereof, on the opening of Court on said day, or as soon thereafter as counsel can be heard, for an order in accordance with Rule 6 of the Rules of this Court to affirm on the ground

that it is manifest that the appeal herein was taken for delay and that the questions on which the decision of the Court depends are so frivolous as not to need further argument, or, in the alternative, for an order transferring this cause for hearing to the summary docket, and for such other and further relief as to the Court may seem just and proper.

Dated, New York. August 27, 1914.

Yours, &c.,

DANIEL P. HAYS,
Solicitor for Charles E. Littlefield, as Trustee in Bankruptcy, Appellee,
Office and Post Office Address,
No. 115 Broadway,
Borough of Manhattan,
New York City.

To:
THORNDIKE SAUNDERS, Esq.,
Solicitor for Appellants.

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF A. O. BROWN & CO., Bankrupts, SAMUEL C. SCOTTEN *et al.*, Appellants, CHARLES E. LITTLEFIELD, as Trustee in Bankruptcy of A. O. Brown & Co. *et al.*, Appellee.	**No. 1008. October Term, 1913.**

STATE OF NEW YORK, County of New York, } ss.:

DANIEL P. HAYS, being duly sworn, deposes and says:

I am an attorney and counsellor at law in this Court and am of counsel to Charles E. Littlefield, as Trustee in Bankruptcy, appellee herein.

As appears by the transcript of record herein, appellants have taken an appeal to this Court from a decree of the United States Circuit Court of Appeals for the Second Circuit affirming a decree of the District Court dismissing a bill of review filed by appellants.

The bill of review was filed *August 4, 1913*, and sought to review a decree entered *April 20, 1911*. By the decree of April 20, 1911 the petitions in reclamation of appellants herein and First National Bank of Princeton were dismissed. From such decree of April 20, 1911, the appellants herein and

10 said bank appealed to the United States Circuit Court of Appeals for the Second Circuit.

The decree of April 20, 1911, was affirmed by the United States Circuit Court of Appeals. The opinion on such appeal will be found reported under the title of *In re A. O Brown & Co.*, 193 Fed. Rep., 24. From the decree of affirmance of the Circuit Court of Appeals appellants herein and said bank appealed to this Court. This Court affirmed the decree below. The opinion in this Court is reported under the title of *First National Bank* vs. *Littlefield*, 226 U. S., 78. The same counsel on such appeals represented the appellants herein and said bank. The appeals were all heard at the same time
11 and upon the same record, and, as they presented precisely the same question, were decided by this Court at one time.

As further appears by the transcript of record in the Circuit Court of Appeals (page 2), mandates in the usual form were issued by the Circuit Court of Appeals and this Court, affirming the decree of April 20, 1911, of the District Court, and orders of the District Court were entered thereon in conformity with the opinion of the Appellate Court.

By the bill of review in question it is claimed that the decree of April 20, 1911, should be corrected because of "error apparent" upon the face of the record.

12 It is respectfully submitted that, in view of the fact that this Court affirmed the decree of April 20, 1911 (see *First National Bank* vs. *Littlefield*, 226 U. S., 78), upon the appeal of these appellants the claim that the decree is erroneous, is frivolous.

Furthermore the bill of review was filed too late. It could only be filed within the time allowed by law for the taking of an appeal.

I submit as part of this affidavit the transcript of record in the United States Circuit Court of Appeals for the Second Circuit and the opinion of the Circuit Court of Appeals affirming the decree dismissing the bill of review.

The petition in bankruptcy was filed herein August 13
25, 1908, and this estate has therefore been in litiga-
for the last six years. This appeal is preventing an immediate disposition by the trustee in bankruptcy of the funds remaining in his hands and the final disposition of the estate of bankruptcy herein.

WHEREFORE, I ask for an order of affirmance on the ground that it is manifest that the appeal to this Court is taken for delay only, and that the questions on which the decision of the Court depends are so frivolous as not to need further argument, or, in the alternative, that the cause be transferred to the summary docket for hearing.

DANIEL P. HAYS.

Sworn to before me } 14
August 27, 1914. }
HENRY H. KAUFMAN,
Notary Public,
New York County.

Opinion of Circuit Court of Appeals, 213 Fed. Rep., 705, affirming decree dismissing Bill of Review.

In re A. O. BROWN & Co.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.) 15

No. 205.

EQUITY (§ 445)—BILL OF REVIEW—RIGHT TO RELIEF.

Complainants, in bankruptcy proceedings against their brokers, filed a claim for the proceeds of certain corporate stock, pledged by the brokers to a bank, which it had sold, and paid the balance to the bankrupts' receiver. Complainants elected not to argue before the District Court the proposition that they had traced their stock into the shares

16 pledged by the bank, though, many months before claimants' appeal from an adverse judgment was argued in the Circuit Court of Appeals, another case had been disposed of in the Circuit Court of Appeals on an appeal, and an appeal taken from the decision of that court to the United States Supreme Court by complainants' own counsel with reference to the question, on which the decision was reversed. *Held*, that complainants were thereby barred of the right to present such claim by bill of review.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from an
17 order of the District Court, Southern District of New York, dismissing a bill of review filed by appellants August 4, 1913, to review a decree entered in this proceeding on April 20, 1911, which decree dismissed the reclamations of appellant. The opinion of Judge Hand will be found in 213 Fed. 701.

THORNDIKE SAUNDERS, of New York City, for appellants.

HAYS, HERSHFIELD & WOLF, of New York City (RALPH WOLF, of New York City, of counsel), for appellee.

18 Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The facts presented on this appeal are as follows:

The firm of A. O. Brown & Co. being in bankruptcy, Scotten on February 13, 1909, filed a claim in reclamation to 100 shares Steel Common and 300 shares Great Northern Ore. He averred ownership; that the securities were held by the bankrupts as security only for certain debit balances against petitioner; that the bankrupts sold part of the securities; and that the rest were sold

by a bank with which the bankrupts had pledged them, whereby the bankrupts became unable to redeliver the securities to petitioner but that the proceeds came into the hands of the trustee in bankruptcy. He prayed that the trustee be directed to pay to him the proceeds of the securities so sold. Scotten & Snydacker on the same day (February 13, 1909) filed a similar claim for the proceeds of 200 shares Steel Common and 85 shares Illinois Central. 19

These two claims, with several others, some of them represented by the same attorney who appeared for the two, including a claim of the First National Bank of Princeton, came before the referee acting as special master. After a report and rehearing upon the same he filed a second report, November 1, 1910, holding that in the Scotten Case the trustee was entitled to an order denying petitioner's claim in reclamation, without prejudice to a part of it, which concerned the 100 shares of Great Northern Ore stock, concerning which last-named stock no contention is now made here. In the case of Scotten & Snydacker he held that the trustee was entitled to an order denying claimant's petition in reclamation. 20

The report of the special master as to claims of First National Bank of Princeton, Simpson, Bullen, and these two claims of Scotten and Scotten & Snydacker came before the District Court for review and an order was entered April 20, 1911, confirming the special master's report "throughout." On June 29, 1911, the five last-named claimants appealed from that order to this court. The assignments alleged error, in the following particulars (among others): 21

(1) In dismissing the several petitions.

(2) In deciding that claimants' funds were not traced into or connected with the properties and money delivered by the Hanover National Bank to the receiver on September 5, 1908. It may be noted that it is the contention of these two claimants that

22 1,000 shares of Steel Common which the bankrupts pledged with the Hanover Bank as collateral to a loan, included their shares of steel, or a like number of shares which had been bought by the bankrupts to replace theirs.

(3) In omitting to decide that claimants' funds or some parts thereof had been traced into or connected with the securities deposited by bankrupts with the Hanover National Bank on August 24 and 25, 1908, and which either in specie or in surplus came into the hands of the receiver in bankruptcy.

(12) In omitting to determine that claimants' funds were a charge upon the mass of securities and
23 moneys delivered by the Hanover National Bank to the receiver in bankruptcy on or about September 5, 1908.

That appeal was argued on December 15, 1911, and decided January 8, 1912. Our opinion will be found reported in 193 Fed. 24, 113 C. C. A. 348. From our decision the five claimants appealed to the Supreme Court, which affirmed the Court of Appeals, 226 U. S. 110, 33 Sup. Ct. 78, 57 L. Ed. 145.

In a separate proceeding instituted by one Gorman to establish a claim in reclamation to some shares of Greene Cananea stock we held on January 9, 1911, that the claimant had not sufficiently identified. 184 Fed. 454, 106 C. C. A. 536. From that decision
24 appeal was taken to the Supreme Court, which held that there was sufficient proof of identity, reversing our decision. Gorman *v.* Littlefield. 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047.

It is the theory of these claimants that if the rule enunciated in Gorman *v.* Littlefield had been applied to the facts in their cases it would have been held that as to their steel stock identity had been proved. They therefore bring this bill of review which in substance and effect prays for a retrial of their respective claims. They contend that they did not present any argument to the District Court or to the Court of Appeals or to the Supreme Court as

to this part of their claim and that in their record on 25
appeal they left out some of the testimony that referred to the steel stock; also that the appellate courts did not deal with that question.

It appears then that these claimants originally advanced the claim which is the subject of their bill of review; that they either took all the testimony they could muster in its support, or had full opportunity to do so before the referee. That they elected not to argue before the District Court the proposition that they had traced their steel stock into the block of 1,000 shares which was pledged to the Hanover Bank. That, although many months before their appeal was argued in this court the Gorman Case had been disposed of here and an appeal 26
from our decision therein taken (by their own counsel, who also appeared for Gorman), they elected not to present and argue the question (or at least present and reserve it) that our decision in the Gorman Case was unsound. That before the Supreme Court they elected not to call attention to this same question, although for some reason the appeal in the Princeton Bank and these two cases came on for argument there before the earlier appeal in the Gorman Case.

Their theory seems to be that they may bottle up part of their claim, which was, as originally presented, a single one, during review by three successive courts and then years afterwards bring it 27
forth *de novo* to be presented for decision.

Such practice would be intolerable and we fully concur with Judge Hand in his disposition of the bill of review.

Order affirmed.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N.

Supreme Court of the United States.

SAMUEL C. SCOTTEN *et al.*,
Appellants,

AGAINST

CHARLES E. LITTLEFIELD, as Trustee in Bankruptcy of A. O. Brown & Co. *et al.*,
Appellee.

No. 1008—October Term—1913.
No. 439—October Term—1914.

Motion for an order to dismiss or affirm, or, in the alternative, to transfer this cause for hearing to the summary docket.

Now into Court comes Charles E. Littlefield, as Trustee in bankruptcy of A. O. Brown & Co. *et al*, bankrupts, appellee in the above numbered and entitled cause, and moves this Court to dismiss the appeal taken by Samuel C. Scotten and others from the decree of the United States Circuit Court of Appeals for the Second Circuit, and in default of dismissing said appeal, affirming the decree of said Court; and in default of dismissing or affirming said decree, to transfer this cause for hearing to the summary docket; and for cause and ground for this motion to dismiss or affirm, says:

I.—This Honorable Court is without jurisdiction to review on appeal the judgment and decree of the

4 United States Circuit Court of Appeals for the Second Circuit, for the reason that said judgment and decree are final in the said Circuit Court of Appeals, and that no appeal will lie to this Court.

II.—This Honorable Court is without jurisdiction to review, on appeal, the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit, for the reason that said judgment or decree dismissed a "Bill of review to correct error apparent upon the face of the record", upon the ground, among others, that the same was not filed within the time allowed by law, and that said judgment or decree of said Circuit Court of Appeals
5 is final, and therefore no appeal will lie to this Court.

III.—In the event that this Honorable Court should refuse to grant the foregoing motion, and should maintain its jurisdiction on the said appeal, then mover prays that the said decree of the United States Circuit Court of Appeals for the Second Circuit be affirmed, as it is manifest that the appeal was taken for delay, and that the questions upon which decision of the said cause depend are so frivolous as not to need further argument.

6 IV.—In the event that this Honorable Court should refuse to grant the foregoing motion to dismiss or affirm, then mover prays that this cause be transferred for hearing to the summary docket.

V.—Mover avers that notice of intention to present this motion was given to, and a copy of the brief filed in support of same was served upon, appellants and that proof thereof accompanies this motion.

WHEREFORE, mover prays that the appeal of Samuel C. Scotten *et al.* be dismissed, and in the

alternative, that the decree of the United States 7
Circuit Court of Appeals for the Second Circuit be affirmed, and in the event of the denial of said motion, that this cause be transferred for hearing to the summary docket.

And mover shall ever so pray.

DANIEL P. HAYS,
Solicitor for Charles E. Littlefield, as Trustee in Bankruptcy of A. O. Brown & Co., *et al.*

8

9

Supreme Court of the United States.

No. 1008.
OCTOBER, 1913, TERM.

IN THE MATTER

of

A. O. BROWN & COMPANY,

Bankrupts,

SAMUEL C. SCOTTEN *et al*,

Appellants,

CHARLES E. LITTLEFIELD, AS TRUSTEE IN BANKRUPTCY OF A. O. BROWN & CO. *et al.*,

Appellee.

APPELLEE'S BRIEF ON MOTION TO AFFIRM, DISMISS OR ADD TO SUMMARY DOCKET UNDER RULE 6.

DANIEL P. HAYS,
Solicitor for CHARLES E. LITTLEFIELD *as Trustee, etc., Appellee, and for the motion.*

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Supreme Court of the United States.

IN THE MATTER OF A. O. BROWN & COMPANY, Bankrupts, SAMUEL C. SCOTTEN *et al.*, Appellants, CHARLES E. LITTLEFIELD, as Trustee in Bankruptcy of A. O. Brown & Co. *et al.*, Appellee.	No. 1008. October, 1913, Term.

APPELLEE'S BRIEF ON MOTION TO AFFIRM, DISMISS OR ADD TO SUMMARY DOCKET UNDER RULE 6.

The appellants have appealed to this Court from a decree of the United States Circuit Court of Appeals for the Second Circuit affirming decree dismissing a so-called "Bill of Review," filed by them.

The bill of review seeks to review a decree entered April 20, 1911 (p. 15*). The bill of review was filed August 4, 1913, about two and one-half years after the entry of the decree in question.

By the decree of April 20, 1911, the petitions in

*References unless otherwise noted are to pages of transcript of Record in Circuit Court of Appeals.

reclamation of appellants and First National Bank were dismissed (pp. 13 and 14). From such decree of April 20, 1911, appellants and said bank appealed to the Circuit Court of Appeals for the Second Circuit. The decree of the lower Court was affirmed. Appellants and said bank further appealed to the Supreme Court of the United States. The decree of the Circuit Court of Appeals was affirmed (p. 2).

The opinion of the Supreme Court of the United States is reported under the title "First National Bank *et al. v.* Littlefield, 226 U. S., 78."

Notwithstanding the fact that the decree of April 20, 1911, to review which the present bill was filed, was affirmed by this Court, it is nevertheless claimed that there is error apparent upon the face of the record.

A bill of review may only be filed on account of error of law upon the face of the record, or on account of new facts, discovered since the entry of the decree, which could not have been discovered prior thereto through the exercise of due diligence.

This application is not on the latter ground, but apparently on the former, to wit, that there is an error of law apparent upon the face of the record.

POINT I.

No appeal lies to this Court from the Decree dismissing the Bill of Review.

A Bill of Review cannot be filed after the time to appeal has expired. At the time of filing the Bill of Review the time to appeal had long since expired.

Thomas v. *Harvey*, 23 U. S., 146.

POINT II.

There is no error of law apparent upon the face of the record.

It would seem to be a sufficient answer to the entire contention of appellants that the decree in question now said to be erroneous has been affirmed by this Court upon the direct appeal of and against the attack of these appellants (p. 2).

First National Bank v. *Littlefield*, 226 U. S., 78.

POINT III.

The error of law must be apparent upon the face of the record and not upon evidence outside of the record.

Buffington v. *Harvey*, 95 U. S., 99.

POINT IV.

The suggestion that this Court has changed its rulings in regard to reclamation proceedings and cases of the kind at bar is not tenable.

To support this, the case of *Littlefield* v. *Gorman*, reported in 229 U. S., 19, is cited, but this case has no application to the facts presented in the case at bar.

First National Bank v. *Littlefield*, 226 U. S., 78.

Schuyler v. *Littlefield*, 232 U. S., 166.

But it is no ground for filing a bill of review that the Court has changed its rulings.

Tilgham v. *Werk*, 39 Fed. Rep., 680.

POINT V.

The motion to affirm or dismiss should be granted or in the event of the denial thereof the cause should be transferred to the Summary Docket for hearing.

Respectfully submitted,

DANIEL P. HAYS,
Solicitor for Charles E. Littlefield as Trustee, etc., Appellee, and for the motion.

Synoptical Index.

INDEX CASES CITED:

Supreme Court of the United States

No. 439 October Term, 1914.

SAMUEL C. SCOTTEN and SCOTTEN & SNYDACKER, Appellants,

against

CHARLES E. LITTLEFIELD, Trustee of A. O. BROWN & Others, Bankrupts.

Appellee moves to dismiss, affirm or advance. Appellants, replying to attack on Court's jurisdiction beg to cite:

Bankrupt Act, §24a;
U. S. R. S., 26, 828, §6, Ch. 3, Act 1891, March 3;
Houghton vs. Burden, 228 U. S., 290;
Barrow vs. Hunton, 99 U. S., 80;
Hewitt vs. Berlin M. W'ks, 194 U. S., 290;

and the matter following, which applies to said attack and also to appellee's claims that the bill

of review was founded on error apparent, and is out of time; that *these* appellants are concluded by the result of a former appeal. That the questions involved are frivolous and that appellants seek delay and also to the further objections by the District Court that appellants had waived their claims for steel shares and by the Circuit Court of Appeals that appellants' practice was intolerable.

The appeal was from the affirmance by Circuit Court of Appeals of order of District Court that dismissed a bill of review, brought to modify an order of April 20, 1911, denying appellants' reclamations for 300 U. S. Steel (Tr. of Rec., pages 13, 14).

The District Court so ordered because, as he stated on the record (Rec., page 4), the Circuit Court of Appeals had, in like manner, treated the claims of Talbot and of Gorman.

District Court now says, he was "controlled, then, by authoritative decision of Circuit Court of Appeals" (Rec., page 8).

This Court has now *reversed* the said decision of the Circuit Court of Appeals (Gorman vs. Littlefield, 229 U. S., 19). This is a newly arisen fact of such nature that if it had occurred before the order complained of, that order would not have been made (Rec., pages 2-5).

The same Judge (Hand) who made the order complained of, had previously, in this same matter of Brown (Ex parte Gibbons, 171 Fed., 254), decided directly the other way in a precisely similar case and he there cited as authority the same "Richardson vs. Shaw," cited as authority in Gorman vs. Littlefield. The judgment is evidence of

the facts of reversal and of the principles enforced.

Within a month after this new fact of reversal became known, appellants filed their petition for leave to file a bill of review. After argument, leave was granted, and the order signed and it and the bill were, on June 30, 1913, filed in the District Court Clerk's office. A copy was served on appellee's attorneys. At their request resettlement of the order followed. Then leave was denied "because it was unnecessary," *but the bill was not removed from the files.* On August 4th, an amended bill was filed and motion to dismiss was noticed. On the return of Judge Hand from vacation recess, the bill was dismissed on October 28th, 1913, in accordance with Judge Hand's opinion theretofore made (Rec., pages 1, 2, 7-10).

In "Hoffman vs. Knox" (50 Fed., 488), Ch. J. Fuller (489), "Petition for rehearing treated as a bill of review for errors apparent." "Since the entry of the decree, the Virginia Statutes, giving lien, have been," as to supply claims and as to labor claims, "declared unconstitutional" (490). "To sustain a bill for error apparent, the decree complained of must be contrary" * * * "to some principle or rule of law or equity recognized or acknowledged or settled by decision." "The bill does not lie to correct a mere error which would, in effect, render it a mere substitute for an appeal." "Error apparent must be more than mistaken judgment."

Judge Hand says that in denying appellants' reclamation, he was "controlled by authoritative decision" (Rec., page 8), yet he defines his idea of error apparent as mistake as to the rule to be ultimately applied and finds appellants' petition

to be based on error of law apparent (Rec., pages 7, 8).

The Circuit Court of Appeals does not attempt to decide that the bill is founded on error apparent. Their opinion is (Rec., page 12): "If the rule enunciated in Gorman vs. Littlefield had been applied to the facts in their cases." They must go further back than Gorman vs. Littlefield to make the case one of error apparent. That decision cites for its rule Richardson vs. Shaw, 209 U. S., 365. The error must be plainly discernible at the time of the making of the order complained of to be error apparent.

This "Richardson vs. Shaw" was, however, different in facts from the Gorman or Talbot or appellants' cases, and possibly might be distinguished or disregarded, as it had been by C. C. A. The broker in that case had repossessed himself of the shares and delivered them to the customer and the customer was sued as for a conversion. Of course, the question was, when the title was in the customer—and that is what is restored by the broker's gaining possession as was his duty—the Circuit Court of Appeals refused to consider aught but identity of certificate and so obscured the principle. That is why the petitioners in re the bill of review say, "Errors *are* apparent which could not be *made apparent until now*" (Rec., page 2). It needed the fact of reversal to release the "control of authoritative decision" imposed by the C. C. A. enunciations—the announcement of the principle in Richardson vs. Shaw in 1908. Though now, it is sufficient to say that the delivery to the customer had no effect upon the issue presented in "Title" as that *had been* before the delivery "restored."

Nor is this "Gorman vs. Littlefield" unexpected law like that in Hoffman vs. Knox (ante) or Tilghman vs. Werk (39 Fed., on page 682).

In this latter case, the new or unexpected law was in opposition to a preceding decision of the *same* Court and the Chancellor said:

> "The *order complained of did not appear on the record to be founded on the prior decision* and an appeal was necessary to determine which decision was correct."

In Hoffman vs. Knox, the new decision desired to be applied was entirely new law.

In both cases the petitions for leave to file bills of review were denied because of eight years' neglect to move *after* knowledge.

Opposition is not for insufficiency but because of matters outside the record. These are hereinafter considered.

There is no time limit on bills founded on newly arisen matter further than that diligence after knowledge is required. Appellants acted within a month. And even on bills founded on error apparent, in which cases inspection betrays the error. A good excuse for failure to observe it is sometimes accepted and the limit (imposed by analogy only) is disregarded.

The withdrawal of the Court's consent to filing of the bill "because it was unnecessary" being based on error is to be disregarded.

Appellee urges that the appellants appealed to this Court, and necessarily included their claims for 300 U. S. Steel.

These claims for steel were founded on possession by bankrupts at bankruptcy of similar stock—those

for G. N. O. and Ill. Centr. were for traced proceeds of converted stocks. The proof of each class is distinctive and that in one affords no help for the other. This is severability.

Brown vs. Guaranty Trust Co., 128 U. S., 403.

Fidelity Trust Co. vs. Federal Trust Co., 143 Fed., 156.

First National Bank vs. Peavy, 75 Fed., 155.

Each class is entitled to be separately treated and the joining in one petition would not make a single claim of the two classes.

And in Ricker vs. Powell (100 U. S., 104, 109), where Ricker did not appeal, but his co-defendant did and after the judgment of affirmance and mandate followed, it was held that "Ricker might file a bill of review, for as to him the judgment remains that of the lower Court. The Appellate Court has not passed on his rights."

> "A subsequent appeal brought up a matter that remained unsettled on the first appeal. It was a severable matter from the other subjects of controversy and did not affect their determination. The decree of June 8, 1885, was appealable as to the matter which it fully determined, so also the decree of July, 1887, as to the severable matter which it involved" (Hill vs. Chicago & Evansville R. R. Co., 140 U. S., on page 54).
>
> "Where party intervenes 'pro interesse suo as in equity, and on the trial a general verdict

is rendered and a general judgment entered, * * * (page 163), the verdict was, though single, rendered on different and distinct issues. * * * The judgment must be regarded as joint only in form, but several in fact and in law. * * * In fact, there were two suits, one interjected into the other (page 164). In equity * * * where parties have distinct and separate interests, the same rule applies to joint decrees (Hanrick vs. Patrick, 119 U. S., 156).

"And the opinion by the Appellate Court is evidence of what questions were decided" (In re Sanford Fork & Tool Co., 160 U. S., 249, 255, and In re Potts, 166 U. S., 263).

And the rule in New York practice is "as to one or more judgments entirely disconnected, but included in same record, a prior appeal from either part does not affect an appeal from the other part" (Genet vs. Davenport, 60 N. Y., 194, 196, 197. Also, Williams vs. Western Union, 93 N. Y., 162, on pages 193, 194).

This is not a case where an appeal from all points and an affirmance without more has raised a presumption that the Appellate Court considered and determined every matter. The facts, opinions and record overcome that presumption. Nor is it a splitting up of a single claim.

Appellants' original petitions filed in 1908, based on information they had received from Assignee Rhodes, asked the proceeds of the stocks so sold. Scotten claimed 200 G. N. O. and 100 U. S. Steel. Scotten and Snydacker claimed 85 Ill. Centr. and 200 U. S. Steel. Each presented his claims in single petition. These petitions were referred back

on February 17th, 1910, to the Special Master John J. Townsend, Esq. (Tr. of Rec., page 2).

Thereafter the testimony developed that the bankrupts at Bankruptcy were carrying one thousand shares of steel stocks on pledge with the Hanover National Bank; appellants claimed three hundred of these shares as being carried for them. Citing Richardson vs. Shaw, 209 U. S., 365, and other cases in support of their claims. (Rec., page 3). Appellants' claims for the steel stocks were separately considered by the Special Master from 100 shares of G. N. O. These he awarded to Appellant Scotten and this was affirmed in the District Court (183, F., 861). Other G. N. O. of Scotten's & Scotten's and Snydacker's, 85 Ill. Centr., were reported adversely and so were appellants' claims for the 300 shares U. S. Steel.

The master, upon these latter claims reporting:

> "Claimants ask 300 Steel or proceeds from the pledges to Hanover Bank.
>
> But as Claimant has failed to trace to Hanover Bank *any particular certificate, I feel constrained to follow the decision* of the C. C. A. of this Circuit, in re McIntyre & Company.
>
> Claimants' contentions are supported by In re Brown ex parte Gibbons, &c., 22 A. B. R., 500—Richardson vs. Shaw, 19 A. B. R., 717 to 721—In re Graff, 8 A. B. R., 744 to 748—Skiff vs. Stoddard, 63 Conn., 198, 225."

"SAM C. SCOTTEN carried in his account 100 Steel and SCOTTEN & SNYDACKER carried 200 Steel. None of the shares could be traced. The numbers of the certificates

not appearing in the books; but a thousand shares were in pledge to the Hanover Bank and the surplus on the pledge, free of claim, is in hands of trustee."

Exceptions to this report were filed by your petitioners' solicitor and attorney in said Clerk's office, on November 4th, 1910.

Meantime, appellants' attorney, in November, 1911, as one of the attorneys of James E. Gorman, whose petition for 250 Green Cananea had been dismissed by District Judge Hough, presented his appeal to this Circuit Court of Appeals. This claim was identical in fact with appellants' claims for steel stocks save in the one immaterial feature that the Green Cananea were in box while the steel stocks were in pledge. There was no identification by numbers of certificates, nor was any continuous carrying of such stocks shown.

The Court said:

> "The precise point raised here was before us in re McIntyre exp. Talbot. Attention is called to the point that Judge Hand had decided one way (171 Fed., 254) and Judge Hough the other way in the case before us. Counsel for Talbot presented a brief of 34 pages, citing substantially all the authorities to which we are now referred and by the same line of reasoning. We sustained Judge Hough and we see no reason for reopening the question settled by that decision" (184 Fed., 454).

These cases (Talbot & Gorman) were similar to the appellants' claims for steel stocks, and

appellants' attorney, in presenting "Exp. Gorman" appeal to the Circuit Court of Appeals, relied on the authority of "Richardson vs. Shaw" (209 U. S., 365) as settling the rule of law as to stocks of similar kind to claimants found in possession of bankrupts or under their control in pledge and unclaimed by others.

District Court order was affirmed, and Gorman was, in February, 1911, allowed an appeal to the United States Supreme Court.

Then the Master's report, including among other claims that in the matter of these claimants' steel stocks came before the District Court and as to such claim the District Court Judge wrote:

"Ex parte Scotten.
Ex parte Scotten and Snydecker
Claims to Stock in Specie."

> "(6) These claimants likewise claim some of their stock in specie upon the theory that it must be presumed to be included in some of the collateral found with the bank, 1,000 shares of United States Steel, 3,000 shares of Copper. It has been decided twice by the Circuit Court of Appeals. Re McIntyre Ex parte Talbot, 181 Fed., 960, 104 C. C. A., 424. Re Brown, Ex parte Gorman, 184 Fed., 454, that there is no presumption of restoration arising from the presence of similar stock at insolvency" (189 F., 439).

The order was entered generally covering all claims. Appellants had the usual remedies, appeal and rehearing (both unpromising), but at that time no bill of review. That right came with new matter.

Appellants had faith in their tracing the proceeds of G. N. O. and Ill. Centr. up to the 24th of August, the day before failure, and then that the trust funds remained there unapplied to the certified checks of that day (Tr. of Oct. Term, 1912, No. 572, page 49), and these were applied (by offset, *as matter of law*) on the 25th at failure, leaving a balance of $2,055.97, which was paid over to the receiver (id., 20). The C. C. A. held that the time when the certification was made was the significant time (page 79) this Court affirmed (226 U. S., 78).

This faith the appellants held at the time, and after, they presented the argument to the District Court. When it denied all reclamations as stated, the appellants could not appeal from the denial of the steel claims on any ground, besides that they had argued in the Gorman appeal. They could not be traced (Rec., page 3). To reserve and wait is not intolerable practice. Any difference between that and presenting the question fully in the assignment of errors and record, and then consuming the Court's time in pointing out the matters so reserved, is in favor of the appellant's practice and in line with this Court's efforts to exclude matters unnecessary to the question to be decided (§997 U. S. R. S. and Rules of this Court).

It is directly resultant on the C. C. A.'s errors. Why should appellants desire a second appeal bringing up the same question when a safer and cheaper remedy by bill of review could be sought *if* the Gorman appeal here succeeded.

These appellants then joined the appeal by "First National Bank of Princeton" limiting the appeal to agree with the other appellants in the assignment of errors to the "*tracing of the pro-*

ceeds of stocks converted by bankrupts before bankruptcy." They included in the record only that part of the report of the Special Master that related to the 50 G. N. O. the proceeds of which are included in the claim of Samuel C. Scotten on this Appeal" (Transcript, In re First Nat. Bank of Princeton, and ors., page 152, fol. 456), and "that part of report of Special Master relating to 85 Ill. Central certificates, the proceeds of which are included in the claim of Scotten & Snydacker on this appeal" (Transcript, In re First Nat. Bank of Princeton, and ors., page 156, fol. 466). This record on appeal did not contain the portion of the report recited in the Bill of Review, and the exceptions filed by these appellants. The opinion of the District Court in that record omitted that portion of the District Judge's opinion recited in the Bill of Review (Transcript, page 12, ante, page 11, and reported in 189 Fed., 439).

So that this Circuit Court of Appeals did not have before it the question as to the steel stocks, nor as to any stocks claimed in specie.

And in its opinion (193 Fed., 25) it wrote: "It is sufficient now to say that the other four claims (meaning to include these appellants) are of a similar character for stocks *converted by Brown & Co. before bankruptcy.*" (And at end of page 29.) "It is unnecessary to discuss the other four claims which are not treated in detail in the brief. The facts are similar to those recited and the conclusion is the same in all."

The Princeton Bank and the other claimants than appellants had no claims except for converted stocks, proceeds traced.

The Supreme Court had the same record and it affirmed, writing (226 U. S., 111): "The stocks

had been converted; there was a failure to trace any of the proceeds of the converted stocks into the hands of the receiver. The claim of the Princeton Bank has been especially presented, under an agreement, that the decision of that claim will govern as to the others."

The "agreement" referred to is on page 83, Supreme Court Record, and, in terms, recites "*proceeds of stocks converted by bankrupts.*"

The District Judge (on page 9 of Tr. of Rec. on this appeal) argues that appellants' assignment of errors was broad enough to cover the claims for steel. He, however, omits the essential words of that cited assigned error (Tr. of Rec., Princeton Bank, 1912, No. 572, page 2). "Omitting to decide that claimant's funds or some parts thereof had been traced into or connected with," &c. (page 84). "Deciding that the proceeds of appellants' stocks converted by said bankrupts had not been traced into," &c. (page 9, Record, pending appeal). "It was alleged an error that no rights in specie or in the properties as well as in the cash surplus covered every possible claim," and "the Circuit Court of Appeals must be held to have passed on all."

Further, the Judge sees nothing to affect his *contention* in the various facts appearing on the record in this court, to wit, No. 572 of 1912, pages 36 and 37, Exhibit 23, a long list of stocks that with much money passed to the receiver, to any of which that assignment of error applied. And that the same record contained (page 70) only "that part of the report of the special Master relating to the 50 G. N. O., the proceeds of which are included in the claim of Samuel C. Scotten

on this appeal," and (page 71) "that part of the report of special Master relating to 85 Ill. Centr., the proceeds of which are included in the claim of Scotten & Snydecker.

The Circuit Court of Appeals makes no suggestion as to this claim by the District Judge unless it be inferred from their (Tr. Rec., page 11) heading "the assignments alleged" and following a quotation of the assignment of error inserted, "it is to be noted that it is the contention of these two claimants that 1,000 shares of steel common which the bankrupts pledged with the Hanover Bank as collateral to a loan included their shares of steel or a like number of shares which had been brought by the bankrupts to replace theirs," which was not in appellants' assignment of errors and can only be an expression of their sense of the insufficiency of the assignment to include these steel shares. Their affirmance was "of the disposition of," &c. (Rec., page 12).

And the Court also said of Appellants: "They elected not to present and argue the question or at least present and reserve it," &c.

But says Judge Hand: "If they did not appeal the claims they waived them (Rec., page 9).

Waiver is the "intentional abandonment of a known right" (193 N. Y., 360, Clark vs. Trustee) as it could not till *now* be a *known* right to file a bill of review because of the reversing by the Supreme Court of the Gorman case (Gorman vs. Littlefield, 229 N. Y., 19), there was no waiver of a bill of review, but, of course, a motion to rehear would be too late, and there was no election of remedy by appeal.

A party has a right to appeal and then abandon it and take up a bill of review (Ensminger vs. Powers, 108 U. S., 292, and O'Hara vs. McConnell, 93 U. S., 150, Pilkinton vs. Potwin, 144 N. W., 39, and Street's Fed. Eq. Pr., §2146). And on new and sufficient facts a second bill of review (Purcell vs. Miller, 4 Wall., 519). In Ensminger vs. Powers (108 U. S., 302, 303) Powers and the City of Memphis, from whom Powers had a lease of land, had appealed to the Supreme Court from a decree improperly rendered. After nearly two years, the docket fee not having been paid, the appeal was dismissed, mandate sent down and motion for damages and for placing Ensminger in possession had been made. Then Powers filed a bill of review alleging the same matter as on her appeal, and she thought the city would pay the docket fee. The Court said, "she had a right to appeal and *as the matter was not heard on the merits*, she may well have concluded that a bill of review was preferable, though she might have received on the appeal the same relief as claimed in the bill of review."

Assignment of errors of District Court (printed on pages 2 and 3 of Rec., in Oct. Term, 1912, No. 572, in this Court) "The First National Bank of Princeton &c., and others, against Charles E. Littlefield," points to

1st. Dismissing their petitions.

2nd. Deciding that claimants' funds were not *traced* into, &c.

3rd. Omitting to decide that claimants' funds had been *traced*," &c.

And those as to the Circuit Court of Appeals (same record, page 83):

1st. "In affirming," &c.

2nd. "Deciding that proceeds of appellants' stocks *converted* by said bankrupts had not been *traced*," &c.

Compare the actual with the C. C. A. statement of this same assignment (on page 11 of Tr. of Rec. on this appeal).

No *tracing* is required as to the steel stocks and none could be made the Master found (Tr. of Rec., here page 3).

Immediately after the Gorman decision of Supreme Court the bill of review was filed and contained a prayer to lessen the general proof so filed in the value of the steel stocks.

A proof of claim in bankruptcy is not an election of remedies (Encycl. Pl. & P., V. 7, page 7, page 362), a proof may be withdrawn or amended at the whim almost of the person filing.

Remington Suppl., §623, page 152;
In re Strickland (21 A. B. R., 734);
In re Ham & Co. (23 A. B. R., 596);
Loveland Bankruptcy (page 869);
Hutchinson vs. Otis (190 U. S., 552).

Oct. , 1914.

Respectfully submitted,

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SCOTTEN *v.* LITTLEFIELD, TRUSTEE OF BROWN, BANKRUPT.

APPEAL FROM CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 439. Motion to dismiss or affirm submitted October 13, 1914.—Decided December 14, 1914.

Bills of review are on two grounds: first, error of law apparent on the face of the record without further examination of matter of fact; second, new facts discovered since the decree, which should materially affect the decree and probably induce a different result.

An aspect of the claim involved cannot be held back when the case is presented to the court and later made the subject of a bill of review.

Although the decision of the District Court which determined the case sought to be reviewed is alleged to have been decided upon principles inconsistent with a subsequent decision by this court, the subsequent decision will not lay the foundation for a bill of review for errors of law apparent, or for new matter *in pais* discovered since the decree and requiring a different result.

213 Fed. Rep. 705, affirmed.

THE facts, which involve the principles of law upon which bills of review are granted and their application to this case, are stated in the opinion.

Mr. Daniel P. Hays for appellee, in support of the motion:

No appeal lies to this court from the decree dismissing the bill of review. A bill of review cannot be filed after the time to appeal has expired. At the time of filing the bill of review the time to appeal had long since expired. *Thomas* v. *Harvey*, 10 Wheat. 146.

There is no error of law apparent upon the face of the record. The decree now said to be erroneous has been affirmed by this court upon the direct appeal of and

against the attack of these appellants. *First National Bank* v. *Littlefield*, 226 U. S. 78.

The error of law must be apparent upon the face of the record and not upon evidence outside of the record. *Buffington* v. *Harvey*, 95 U. S. 99.

The suggestion that this court has changed its rulings in regard to reclamation proceedings and cases of the kind at bar is not tenable. *Littlefield* v. *Gorman*, 229 U. S. 19, has no application to the facts presented in the case at bar, and see *First National Bank* v. *Littlefield*, 226 U. S. 78; *Schuyler* v. *Littlefield*, 232 U. S. 466.

It is no ground for filing a bill of review that the court has changed its rulings. *Tilgham* v. *Werk*, 39 Fed. Rep. 680.

Mr. Thorndike Saunders for appellant, in opposition to the motion:

This appeal is within this court's jurisdiction. It brings up dismissal of bill of review to modify order of denying reclamations of 300 shares U. S. Steel Co. stock. The authoritative decision on which the case was decided was subsequently reversed by this court, 229 U. S. 19, on authority of *Richardson* v. *Shaw*, 209 U. S. 365. This newly arisen fact is the basis of this bill of review. It is not new law, nor is it a change of the ruling of the Supreme Court. If this reversal had occurred before, the decision below in this case would have been different.

Appellants' claims for the Steel Company stock were severable from their claims for other stocks; they were so treated by the master and by the District Court.

Appellants' counsel meanwhile presented the appeal which was decided by the Circuit Court of Appeals and subsequently appealed from their decision to this Supreme Court.

Appellants could not trace their Steel Company shares of stock; their claims were as to stock in control of bankrupts by restoration, as in Gorman. So considering the

remedies and the situation, they preferred to rest that claim till final decision of the Gorman appeal.

Appellants joined the traced proceeds of their other stocks with the First National Bank of Princeton in their appeal to this court, and there was no waiver of these Steel Company stock claims.

In support of these contentions, see Bankruptcy Act, § 24*a*; *Barrow* v. *Hunton*, 99 U. S. 80; *Brown* v. *Guaranty Trust Co.*, 228 U. S. 403; *Clark* v. *Trustee*, 193 N. Y. 360; *Ensminger* v. *Powers*, 108 U. S. 292; *Fidelity Trust Co.* v. *Fed. Trust Co.*, 143 Fed. Rep. 156; *First Natl. Bk.* v. *Peavy*, 75 Fed. Rep. 155; *First Natl. Bk. of Princeton* v. *Littlefield*, 226 U. S. 41; *Genet* v. *Davenport*, 60 N. Y. 197; *Ex parte Gibbons*, 22 A. B. R. 550; *S. C.*, 171 Fed. Rep. 254; *Gorman* v. *Littlefield*, 184 Fed. Rep. 454; *S. C.*, 229 U. S. 19; *In re Graff*, 8 A. B. R. 744; *In re Ham & Co.*, 23 A. B. R. 596; *Hanrick* v. *Patrick*, 119 U. S. 156; *Hewitt* v. *Berlin Machine Wks.*, 194 U. S. 296; *Hill* v. *Chi. & Evans. R. R.*, 140 U. S. 54; *Houghton* v. *Burden*, 228 U. S. 290; *Hoffman* v. *Knox*, 50 Fed. Rep. 488; *Hutchinson* v. *Otis*, 190 U. S. 552; Loveland, Bankruptcy, 869; *Re McIntyre*, 24 A. B. R. 20; *O'Hara* v. *McConnell*, 93 U. S. 150; *Pilkinton* v. *Potwin*, 144 N. W. Rep. 39; *Re Potts*, 166 U. S. 203; *Purcell* v. *Miller*, 4 Wall. 519; Remington, Suppl., § 623; *Ricker* v. *Powell*, 100 U. S. 109; *Richardson* v. *Shaw*, 209 U. S. 365; *In re Sanford Tool Co.*, 160 U. S. 249; *Skiff* v. *Stoddard*, 63 Connecticut, 22, 25; *Ex parte Scotten*, 189 Fed. Rep. 439; *Ex parte Scotten*, 193 Fed. Rep. 25; *Re Strickland*, 21 A. B. R. 734; Street, Federal Equity, § 2146; *Re Talbot*, 181 Fed. Rep. 960; *Tilghman* v. *Werk*, 39 Fed. Rep. 682; *Williams* v. *West. U. Tel. Co.*, 93 N. Y. 162.

Memorandum opinion by MR. JUSTICE DAY, by direction of the court.

This case presents another phase of the bankruptcy of A. O. Brown & Company, stock brokers in New York.

See *First National Bank of Princeton* v. *Littlefield, Trustee*, 226 U. S. 110; *Gorman* v. *Littlefield*, 229 U. S. 19; *Schuyler* v. *Littlefield*, 232 U. S. 707. This case is submitted on the motion of appellee to dismiss, affirm, or place on the summary docket. The appellants filed a petition for reclamation in the bankruptcy court, which concerned among other stocks three hundred shares of United States Steel stock, which are now the subject-matter of this controversy. On April 20, 1911, the District Court confirmed the report of the Master, and entered an order dismissing the petitions of appellants and of some other claimants. Appellants appealed to the Circuit Court of Appeals, and that court affirmed the District Court, 193 Fed. Rep. 24. The case then came to this court, and the judgment of the Court of Appeals was affirmed, 226 U. S. 110. On August 4, 1913, the bill of review with which the present proceeding is concerned, was filed in the District Court. This was more than two years after the original order in the District Court, dismissing the reclamation proceeding, was made. The District Court dismissed the bill of review, 213 Fed. Rep. 701. That decree was affirmed in the Circuit Court of Appeals, 213 Fed. Rep. 705. Then the case was appealed here.

Both courts below put their decisions on the ground that the appeal to the Circuit Court of Appeals from the original order of the District Court in the reclamation proceedings really involved the claim for the United States Steel stock in its present aspect, and that if not presented to the Court of Appeals when there on appeal it could not be held back and made the subject of a bill of review, as is now attempted to be done. We think this decision was clearly right. Furthermore, the ground alleged for the bill of review now is, that the principles which determined the disposition of the *Gorman Case*, 229 U. S. 19 (decided May 26, 1913, a little more than two years after the decree in the District Court) reversing

the Circuit Court of Appeals in the same case, 175 Fed. Rep. 769, would, had they been applied in this case, have required a different result in the District Court in dealing with the original petition in reclamation, so far as the three hundred shares of the United States Steel stock, pledged with the Hanover National Bank, are concerned.

Bills of review are on two grounds; first, error of law apparent on the face of the record without further examination of matters of fact; second, new facts discovered since the decree, which should materially affect the decree and probably induce a different result. 2 Bates' Federal Equity Procedure, 762; Street's Federal Equity Practice, Vol. 2, § 2151.

If the decision in the *Gorman Case* would have required a different result if the principles upon which it was decided had been applied in the original proceeding, which we do not find it necessary to decide, such subsequent decision will not lay the foundation for a bill of review for errors of law apparent, or for new matter *in pais* discovered since the decree and probably requiring a different result. *Tilghman* v. *Werk*, 39 Fed. Rep. 680 (opinion by Judge Jackson, afterwards Mr. Justice Jackson of this court); *Hoffman* v. *Knox*, Circuit Court of Appeals, Fourth Circuit, 50 Fed. Rep. 484, 491 (opinion by Chief Justice Fuller).

The decree of the Circuit Court of Appeals is

Affirmed.